Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-619 OF 1995
SHAIK DAUD, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
10 MARCH 1997, 11 AND 16 FEBRUARY 1998

Equity — Estoppel — Electricity bills with discount credit notes for certain period — Withdrawal of discount — Whether appellant estopped from claiming repayment of discount for amount paid according to discounted bills

The appellant supplied electricity to the respondent's industrial premises. The respondent was entitled to a 20% government discount on all its electricity bills with effect from 1 February 1987. The appellant sent the monthly electricity bills to the respondent with the credit notes for the 20% discount and also covering letters confirming the amounts under the bills. The 20% credit notes were issued for the period February 1987 to December 1989. In August 1990, the appellant was informed that the 20% government discount had been withdrawn with effect from 1 February 1988. The appellant claimed that because of the delay in receiving the notice of the withdrawal from the government, the respondent continued to enjoy the discount from February 1988 until August 1990. The respondent made a repayment of the 20% discount from January 1990 till August 1990 but refused to make the repayment for the discount given from February 1988 to December 1989. Letters from the appellant to the respondent notifing the respondent that the 20% discount had been withdrawn with effect from January 1990 were tendered in court. The High Court judge found as a matter of fact that the withdrawal of the 20% discount took effect only from January 1990 and held, inter alia, that the appellant was estopped from enforcing its claim (see [1995] 4 MLJ 673). The appellant appealed.

Held, dismissing the appeal:

(1) (Per **Ahmad Fairuz JCA**) The respondent had made proper payments to the appellant based on the electricity bills with the credit notes for the 20% discount. Indeed, the discount together with costs incurred by the respondent in producing its steel billets had been taken into consideration by the government when approving the price of the steel billets. The respondent had relied upon the monthly discounted electricity bills in acsertaining the price of its steel billets and the steel billets had already been sold. It was inequitable if the respondent was required to repay the amount of the discount as claimed by the appellant. Furthermore, the letters from the appellant notified the respondent that the discount had been withdrawn with effect from January 1990. Therefore, the appellant was estopped from claiming the amount for the months of February 1988 to December 1989. The reasons given by the High Court judge on the issue of

estoppel were not out of place and it was difficult to disturb his judgment (see p 716D–I). A

(2) (Per **Mokhtar Sidin JCA**) The whole appeal was a question of fact. The appellant had not shown where the learned judge had erred in his finding or that the finding was not supported by or adverse of the evidence before him. As such, there was no reason for the court to disturb his finding and for that reason alone his decision should be confirmed and the appeal should be dismissed. Further, the judge had dealt with the issue of estoppel correctly and it could not be faulted (see p 719D–E). B

[Bahasa Malaysia summary C

Perayu membekalkan tenaga elektrik kepada premis perusahaan penentang. Penentang berhak mendapatkan diskaun kerajaan sebanyak 20% atas semua bil elektriknya mulai daripada 1 Februari 1987. Perayu menghantar bila elektrik bulanan kepada penentang dengan nota kredit untuk diskaun 20% dan juga surat iringan yang mengesahkan amaun di bawah bil-bil. Nota-nota kredit 20% dikeluarkan untuk tempoh Februari 1987 hingga Disember 1989. Pada bulan Ogos 1990, perayu diberitahu bahawa diskaun kerajaan 20%telah ditarik balik mulai 1 Februari 1988. Perayu menuntut bahawa disebabkan kelewatan dalam penerimaan notis mengenai penarikan balik daripada kerajaan, penentang terus menikmati diskaun dari bulan Februari 1988 sehingga bulan Ogos 1990. Penentang membuat bayaran balik diskaun 20% dari bulan Januari 1990 sehingga bulan Ogos 1990 tetapi enggan membuat bayaran balik untuk diskaun yang diberikan dari bulan Februari 1988 hingga Disember 1989. Surat-surat daripada perayu kepada penentang yang memaklumkan kepada penentang bahawa diskaun 20% telah ditarik balik mulai bulan Januari 1990 dikemukakan di mahkamah. Hakim Mahkamah Tinggi mendapati sebagai satu fakta bahawa penarikan balik diskaun 20% berkesan hanya mulai bulan Januari 1990 dan memutuskan, antara lain, bahawa perayu diestop daripada menguatkuasakan tuntutannya (lihat [1995] 4 MLJ 673). Perayu membuat rayuan. D E F G

Diputuskan, menolak rayuan:

(1) (Oleh **Ahmad Fairuz HMR**) Penentang telah membuat bayaran yang betul kepada kepada perayu berdasarkan bil elektrik dengan nota kredit untuk diskaun 20%. Malah, diskaun bersama dengan kos yang ditanggung oleh penentang dalam menghasilkan keluli-kelulinya telah diambil kira oleh kerajaan ketika meluluskan harga keluli-keluli. Penentang telah bergantung kepada bil elektrik bulanan yang dikurangkan dalam menentukan harga keluli-keluli dan keluli-keluli telah pun dijual. Adalah tidak saksama sekiranya penentang dikehendaki membayar balik amaun diskaun seperti yang dituntut oleh perayu. Seterusnya, surat-surat daripada perayu memaklumkan kepada penentang bahawa diskaun telah ditarik balik mulai bulan Januari 1990. Maka, perayu diestop daripada H I

menuntut amaun-amaun untuk bulan Februari 1988 hingga Disember 1989. Alasan-alasan yang diberikan oleh hakim Mahkamah Tinggi dalam isu estopel adalah kena pada tempatnya dan adalah sukar untuk mengganggu-gugat penghakiman beliau (lihat ms 716D–I).

(2) (Oleh **Mokhtar Sidin HMR**) Keseluruhan rayuan adalah persoalan fakta. Perayu tidak menunjukkan di mana hakim yang bijaksana terkhilaf dalam keputusan beliau atau bahawa keputusan tidak disokong oleh atau bertentangan dengan keterangan di hadapan beliau. Oleh itu, tiada sebab untuk mahkamah mengganggu keputusan beliau dan untuk alasan itu sahaja keputusan beliau patut disahkan dan rayuan patut ditolak. Seterusnya, hakim telah menguruskan isu estopel dengan betul dan ia tidak boleh dipersalahkan (lihat ms 719D–E).]

[*Editorial Note*: The appellant's appeal to the Federal Court has been withdrawn.]

Notes

For cases on estoppel, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1938–1956.

Legislation referred to

Evidence Act 1950 s 101

Appeal from: Suit No D2–22–1037 of 1992 (High Court, Kuala Lumpur)

Muhammad Nur Azmi bin Hashim (*Goh Peng Hong* with him) (*Bakar Khalil & Partners*) for the appellant.

VK Lingam (*Shauna Madhavan* with him) (*VK Lingam & Co*) (for the respondent.

16 February 1998

Shaik Daud JCA: I have the advantage of reading in draft the judgments of both Mokhtar Sidin and Ahmad Fairuz JJCA and I concur with them.

10 Mac 1997

Ahmad Fairuz HMR: Pada masa-masa yang material, perayu, Tenaga Nasional Bhd, telah membekalkan dan penentang, Perwaja Steel Sdn Bhd, telah menggunakan aliran elektrik di premis perindustrian penentang di Kemaman, Terengganu. Bagi penggunaan itu penentang telah, antara lainnya, diberi potongan atau diskaun 20% (selepas ini disebut 'diskaun itu') atas bil-bil elektrik bulanannya. Diskaun itu, yang diberi mulai 1 Februari 1987, adalah atas ehsan dan arahan Kementerian Perdagangan dan Perindustrian Malaysia.

Pada 29 Ogos 1990, perayu telah dimaklumkan oleh Kementerian Perdagangan dan Perindustrian Malaysia bahawa diskaun itu ditarikbalik mulai 1 Februari 1988. Oleh yang demikian, perayu menuntut agar penentang memulangkan jumlah diskaun itu iaitu yang telah diberi kepada penentang dari bulan Februari 1988. Kerana penentang hanya mengembalikan amaun-amaun diskaun itu bagi bulan-bulan Januari hingga Ogos 1990, perayu menuntut penentang membayar balik amaun-amaun diskaun itu bagi bulan-bulan Februari 1988 hingga Disember 1989.

Dalam penghujahannya, peguam terpelajar perayu menarik perhatian mahkamah ini kepada ms 182–185 rekod rayuan yang menunjukkan dokumen-dokumen yang diberikan oleh perayu kepada penentang pada tiap-tiap bulan. Antara dokumen-dokumen itu ialah dokumen mengenai diskaun itu. Diakui oleh perayu bahawa dokumen mengenai diskaun itu diberi kepada penentang mulai 1 Februari 1987 hingga 31 Disember 1989. Perayu hanya menghentikan pengeluaran dokumen itu mulai 1 Januari 1990.

Berasaskan dokumen-dokumen tersebut dalam perenggan 3 di atas, penentang telah membuat pembayaran-pembayaran sewajarnya kepada perayu. Dengan lain perkataan, penentang membayar bil-bil mengenai penggunaan elektrik itu setelah ditolak, antara lainnya, diskaun-diskaun itu. Malah, diskaun itu bersama-sama dengan kos-kos yang ditanggungi oleh penentang dalam mengeluarkan keluli-kelulinya (steel billets) telah diambil kira oleh pihak kerajaan semasa meluluskan harga keluli-keluli yang dibuat oleh penentang.

Berlatarbelakangkan keadaan-keadaan yang digambarkan oleh perenggan-perenggan di atas, amat ketara sekalilah bagaimana tak saksamanya (inequitable) jika penentang diperlukan mengembalikan amaun-amaun diskaun itu kepada perayu seperti dituntutnya. Kepincangan kesaksamaan ini amat terserlah jika diteliti dari pendekatan diskaun itu juga telah digunakan sebagai kayu pengukur penentu harga keluli-keluli penentang. Dan keluli-keluli buatan penentang itu telahpun dijual dengan harga-harga yang diluluskan oleh kerajaan. Barang diingat juga bahawa surat-surat daripada perayu sendiri memaklumkan penentang yang diskaun itu ditarik balik mulai 1 Januari 1990 dan surat-surat itu masing-masingnya bertarikh 24 Julai 1990 dan 27 Ogos 1990. Maka kerana itulah, penentang telah membayar balik amaun-amaun diskaun itu bagi bulan-bulan Januari hingga Ogos 1990. Dan tindakan penentang itu tidaklah ternafi kewajarannya jika dilihat dari sudut perayu telah diestop daripada menuntut amaun-amaun bagi bulan-bulan Februari 1988 hingga Disember 1989. Alasan-alasan penghakiman yang arif hakim Mahkamah Tinggi dalam hal estopel ini adalah kena pada tempatnya (lihat [1995] 4 MLJ 673).

Atas sebab-sebab tersebut dalam perenggan-perenggan sebelum ini nyatalah bahawa penghakiman yang arif hakim Mahkamah Tinggi amat sukar sekali untuk diganggu-gugatkan. Oleh kerana tiada terdapat sebarang kesalahan atau kesalaharahan di pihak yang arif hakim Mahkamah Tinggi, saya bersetuju supaya rayuan ini ditolak dengan kos dan mengarahkan deposit digunakan untuk kos tercukai.

11 February 1998

Mokhtar Sidin JCA: This is an appeal by the plaintiff ('the appellant') against the decision of the learned judge who had in the High Court dismissed the claim by the appellant against the respondent (see [1995] 4 MLJ 673). The claim by the appellant was for the sum of RM13,127,331.79 together with interest.

In its statement of claim, the appellant stated that at the request of the respondent, the appellant through Contract No 383/85 supplied to the respondent's industrial premises at Kawasan Perusahaan Telok Kalong, Kemaman, Terengganu the electricity supply which was connected on 3 September 1984. Payments of the electricity bill was made under Account No 0441/6001130010. It was the appellant's policy to give a special discount of 30% to specific clients of which the respondent was one of them. The respondent was given an additional discount of 20% by the Kementerian Perdagangan dan Perindustrian with the consent of the Kementerian Tenaga, Telekom dan Pos which was as incentive to new industry but it was subjected to certain conditions. Taking the two discounts into consideration, the respondent was entitled to a 50% discount on any of its electricity bill. It is to be noted that the letter from the Kementerian Perdagangan dan Perindustrian giving the 20% discount was dated 11 March 1987 and that the discount was to take effect from 1 February 1987. The same letter also requested the respondent to contact the appellant's local branch at the place where the premises was situated in order to get the discount.

Based on the above, the appellant sent the monthly electricity bills to the respondent with the credit notes for the 30% discount and the 20% discount and also covering letters, confirming the amounts under the electricity bills. The bills showed that the amount of 30% discount and 20% discount had been deducted and what were the nett amounts to be paid by the respondent. According to the record of the appellant, the discount of 30% had always been given to the respondent and was never withdrawn and the respondent had paid only 70% of the total amount billed. As such, there is no dispute in respect of this 30% discount given by the appellant to the respondent.

The issue in respect of this appeal is the dispute on the 20% discount given by the Kementerian Perdagangan dan Perindustrian which was purportedly withdrawn. There is no dispute that the 20% discount was subsequently withdrawn. The question before us was when was the effective date of the withdrawal. This is important because this will determine the issue whether the appellant is entitled to the claim. To me the whole appeal is a question of fact. It is pertinent to note that the withdrawal of the 20% discount given by the Kementerian to the respondent was that the respondent failed to meet the condition that its electricity bill did not exceed 20% of the total cost of production by the respondent. The appellant was informed of this withdrawal only on 29 August 1990.

The appellant claimed that because of the delay in receiving the notice of the withdrawal of the discount from the Kementerian, the

respondent continued to enjoy the discount of 20% from February 1988 until August 1990. After receiving the notice, the appellant demanded from the respondent for the repayment of the 20% discount claimed to be wrongly given. The respondent paid the appellant the sum of RM4,712,165.17 being repayment of the 20% discount given to the respondent from January 1990 till August 1990 but refused to make the repayment for the discount given from February 1988 to December 1989 amounting to RM13,127,331.79 which is the claim of the appellant against the respondent in the present appeal. From this, it appears that the respondent did not dispute that the discount of 20% was withdrawn but disputed the date when it was withdrawn. In other words, the respondent disputed the fact that the withdrawal was effective from February 1988 to December 1989. Thus in its defence the respondent stated that the payments made by it was based on the monthly bills sent by the appellant to the respondent. The bills included and contained advice of the 30% discount given by the appellant and the 20% discount given by the Kementerian which were in the form of credit notes. Based on those bills where the total discount of 50% had been deducted, were shown that the respondent paid the bills and the appellant acknowledged receipts of those payments. The respondent in its defence stated that when the appellant accepted the payments of the monthly bills for the period in dispute, the appellant did not raise any objection to the payments or impose any condition. Because of the silence by the appellant in accepting the payments, the respondent was induced to accept the 50% discount given as per advice in the credit notes as valid, unconditional and irrevocable and that the payments made by the respondent in respect of those bills were the full and final settlement of those bills. As such, the appellant is estopped from contending that credit notes for the 30% and 20% discounts issued together with the bills were not valid.

It was the contention of the respondent that the letters dated 24 July 1990 and 27 August 1990 from the appellant to the respondent which were exhibited during the trial confirmed that the Kementerian Perdagangan dan Perindustrian and the Kementerian Tenaga, Telekom dan Pos Malaysia had directed the appellant that the 20% discount given to the respondent was to end in January 1990 and not earlier.

The learned judge in his judgment stated that it is the obligation and the legal duty of the appellant to send the correct electricity bills and the 20% credit notes to the respondent. His Lordship went on to say that at all material times the appellant knew that the respondent would rely upon those bills and credit notes to make the payments. His Lordship stated further that those bills and credit notes were signed by authorized officers of the appellant and were properly issued.

The learned judge had the benefits of seeing and hearing the testimonies of the witnesses. His Lordship was of the view that the witnesses did not help the appellant at all since they were not able to show and satisfy the court that the respondent prior to 1 January 1990 knew of the withdrawal of the 20% discount given to it. He went on to say that under s 101 of the Evidence Act 1950, the onus is on the appellant to prove that he is entitled

A to the claim. The burden is on the appellant and it is his duty to prove its claim affirmatively. In this respect, the learned judge found on the evidence adduced before him that the appellant failed to prove its claim.

The learned judge, after perusing all the documents before him, in particular, the letter dated 24 July 1990, found that as a matter of fact the B withdrawal of the 20% discount took effect only from 1 January 1990. In fact, the respondent acknowledged this since it is clear from the statement of claim of the appellant that the respondent had made repayment of the 20% discount given to it from 1 January 1990 onwards. The learned judge came to the conclusion that based on this evidence it is clear that the withdrawal of the 20% discount by the two Kementerian was effective only C from 1 January 1990.

As I have stated earlier, this is a finding of fact. The appellant had not shown to us where the learned judge had erred in his finding or that the finding was not supported by or adverse of the evidence before him. As such, there is no reason for me to disturb his finding and for that reason D alone his decision should be confirmed and the appeal should be dismissed.

As I have mentioned earlier, the respondent in its defence also raised the defence of estoppel. In his judgment, the learned judge dealt with it. I am of the view that he dealt with it correctly and could not be faulted. In his judgment, his Lordship said (at pp 679–680) :

E > The notification to the defendant dated 29 August 1990 and 31 May 1991 purporting to withdraw 20% discount already given by monthly credit notes duly signed and authenticated by the plaintiff's authorized officers cannot now be withdrawn retrospectively. The plaintiff had already reconfirmed by their letter dated 24 July 1990 that they had been instructed by MTI to discontinue the 20% discount with effect from 1 January 1990 and therefore F it does not lie in the mouth of the plaintiff to now deny and contradict its own letters, documents and discount credit notes. To date the plaintiff has not cancelled any of its discount credit notes and neither has it raised any debit notes/invoice in place of the credit notes. Therefore the 20% discount credit notes given by the plaintiff to the defendant continues to be valid, accurate, binding and irrevocable. In the circumstances, the defence of G estoppel succeeds and the plaintiff is estopped form enforcing its claim, ...

I agree with his Lordship in respect of this.

For the above reasons, I see no reason to disturb the finding and the conclusion made by the learned judge. The appeal is hereby dismissed with costs.

H

Appeal dismissed.

Reported by Jafisah Jaafar

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